

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

FEBRUARY 26, 2004
MORNING PAPER
(9:00 A.M. TO 12:00 NOON)
QUESTIONS

ESSAY SECTION

1. Harold was indicted for murder arising from the robbery of a store during which an employee was shot and killed. At Harold's trial, Roger testified that he had been a fellow jail inmate with Harold's brother, James. Roger testified that before James died, James told him that he and Harold had committed the robbery together and that it was he, James, who had shot the store employee. He was cross-examined carefully by Harold's counsel, in an effort to show that he was not a credible witness. Harold was convicted. The conviction was reversed on appeal due to incorrect court instructions to the jury. His lawyer then died.

A. The prosecutor, prior to the second trial, made an extensive good faith effort to locate Roger for the trial but was unsuccessful. The prosecutor offered in evidence at the second trial the transcript of Roger's testimony at the first trial. Harold's new counsel objected, stating that it included hearsay. Harold's new counsel also showed the court Roger's hospital record, which included extensive entries for drug abuse several years before Roger's conversation with James. Harold's new counsel argued that Harold's counsel at the first trial should have cross-examined Roger based upon that hospital record. The court admitted the transcript of Roger's first trial testimony in evidence.

B. Officer Jones, who had arrested Harold at his home, was proffered as a prosecution witness to testify that, while Harold was handcuffed and being driven by him in the police car to the station for booking, Harold insisted upon telling him that he was the one who shot the employee at the store. Harold's counsel objected to the proffered

testimony on the grounds that Harold's father had retained Attorney Smith to represent Harold, that Attorney Smith had so notified Officer Jones the day before Harold was arrested and that Officer Jones had failed to tell Harold about the retention of Attorney Smith. The court allowed Officer Jones to testify about his conversation with Harold.

C. In closing arguments, Harold's counsel argued that Officer Jones' testimony was not credible. The prosecutor argued: "The Commonwealth says, and I say, that Officer Jones is a totally honest man." Harold's counsel objected to that argument. The court overruled the objection.

Harold was convicted and appealed to the Appeals Court.

How should the Appeals Court rule on (A) the admission of the transcript, (B) the testimony of Officer Jones and (C) the overruling of the objection to the prosecutor's argument?

2. Ben, a resident in emergency medicine at Hospital (“Hospital”), a large private downtown medical center, had difficulty “making ends meet” on his resident’s salary and, therefore, moonlighted 2 days a week at Clinic (“Clinic”), a suburban urgent-care “walk-in” facility owned and operated by Dr. White as a professional corporation. The remainder of the week Ben spent serving his residency in the emergency room at Hospital where his hours were long and unpredictable.

Ben was paid a salary by Hospital, participated in its residents’ program and performed all the duties and responsibilities of a resident. Besides Ben’s salary and benefits, Hospital supplied Ben with hospital clothing, instruments and equipment. Ben’s performance as a resident was evaluated by officials at Hospital.

Clinic paid Ben for “moonlighting” at an hourly rate, listed his name on its directory as an emergency room doctor and also provided him with hospital clothing, instruments and equipment but Clinic did not provide any other benefits to Ben. At Clinic, as a matter of policy, Dr. White instructed all doctors at his clinic never to promise a patient a result or cure for his or her condition for which they have been seen by that doctor at Clinic. There was no formal evaluation policy at Clinic, but there was a manual for people who worked there.

During one of his days at Clinic, Ben examined a young woman named Mary who complained that she had experienced severe abdominal cramps for several days and that the pain was getting worse. Ben diagnosed Mary’s condition as a viral gastric disorder, prescribed a mild medication, and assured Mary that she would recover completely and quickly in a few days. The next day Mary telephoned Clinic to speak to Ben because the pain and discomfort had worsened. Unable to reach Ben at Clinic, Mary was directed to

try to reach Ben at Hospital. Subsequently, Mary telephoned and visited Ben at Hospital where, after another examination, Ben repeated his diagnosis and assurances of the previous day. That evening Mary experienced unbearable gastric pain and then visited the emergency room at another hospital where she was operated on for a ruptured appendix.

Mary sued Ben, Hospital and Clinic.

What are the rights and liabilities of the parties?

3. American, Inc. (“American”) was a corporation with factories and assembly plants throughout the United States where it produced various buses and vans for Modern Transport Co. (“Modern”), a private bus company. In Massachusetts, American installed the communication systems in the buses and vans built for Modern. Included within the communications system were high frequency radios made by a company called Radiocom, delivered by Radiocom to American’s plant in Massachusetts and then installed in the vehicles built by American for Modern at the Massachusetts plant.

Radiocom Corp. (“Radiocom”) was a corporation which made radios and other communication products. The equipment that Radiocom manufactured and sold to American was made by Radiocom specifically for Modern according to specifications prepared by Modern for inclusion in the vehicles built by American for Modern.

Pursuant to a contract between American and Radiocom, Radiocom provided high frequency radios to American to be delivered to American’s plant in Massachusetts for installation in the vehicles produced at the Massachusetts plant for Modern. According to the contract, Radiocom would manufacture, according to Modern’s specifications, and deliver 2,000 high frequency radios in installments of 500 radios to American’s Massachusetts plant in intervals of every 120 days. The first shipment of 500 radios was 2 weeks late and included about 150 defective radios that did not meet Modern’s specifications or were otherwise inoperable. The second shipment of 500 radios also arrived late and included about 100 defective radios.

American demanded in writing an immediate shipment of 500 radios from Radiocom in order to meet its own production schedule with Modern but Radiocom responded that it was unable to manufacture the replacement radios within that time

frame. Radiocom could have met American's demand but Radiocom was aware that American reconditioned defective radios and then installed them in other vehicles.

American installed the non-defective radios from the first 2 shipments in the vehicles manufactured for Modern but the deliveries to Modern were late and insufficient under their contract. Modern cancelled the remainder of its contract on the grounds of breach of contract, namely: the deliveries were late, the number of vehicles delivered was less than required and some installed radios were defective. Consequently, American was not able to deliver all of the vehicles required under the terms of the contract with Modern.

What are the rights of the parties?

4. Andrea owned a large commercially- zoned parcel of land along a major highway in Massachusetts, which she had purchased 15 years earlier. Bob, her neighbor, owned a farm abutting the rear of Andrea's land, which Bob had inherited from his mother, Colleen, in 1993. The only access to Bob's land was a dirt road passing through the middle of Andrea's land, which Colleen had used since 1980 and which Bob now used. No permission had ever been given to use the dirt road.

In 2002, Bob sold his farm to Andrea by a quitclaim deed recorded in the Registry of Deeds. Immediately thereafter, Andrea executed a quitclaim deed for the farm to her son, Steve, an out-of-state resident, reserving a life estate in the farm for herself. The deed was recorded in the Registry of Deeds. Neither deed contained any mention of the dirt road access. Without Steve's knowledge, Andrea then entered into a written lease of the farm to Fred. The lease, which provided for a 3-year initial term and a 3-year option to renew, was not recorded in the Registry of Deeds. Fred took possession of the farm, making substantial improvements, planting crops and actively farming it. He continued to use the dirt road to reach the farm.

In December, 2003, Andrea sold the commercially-zoned land along the highway to Developer, who intended to build a shopping mall on the land. Developer recorded her quitclaim deed in the Registry of Deeds.

Andrea has just died. Steve has returned to Massachusetts. He has just learned of the lease of the farm to Fred and has told Fred that he is trespassing and must leave the farm immediately. Developer has erected a fence to block off the dirt road, which passes directly through the area planned for the shopping mall's main building.

What are the rights of the parties?

5. Andrew and Bart were general partners who owned and operated a restaurant and bar called “The Eatery.”

One evening, while Andrew was away on business, Bart, who was tending bar at the Eatery, served several strong drinks to Patrick, a patron sitting at the bar, until he became very drunk and belligerent. Bart then escorted Patrick, stumbling, out the door. Patrick got into his car and began to drive home in an erratic manner. He swerved off the road and struck Denise, a ten-year old girl riding her bicycle on the sidewalk in front of her house.

Denise’s mother, Mary, hearing the collision, ran outside to find her daughter lying on the sidewalk severely injured and in great pain. Mary became highly agitated, experienced chest pains and collapsed. Mary and Denise were both rushed to the hospital in an ambulance called by Frank, Mary’s husband and Denise’s father, who had arrived home minutes after the accident. Denise died in the ambulance on the way to the hospital. At the hospital, Mary went into cardiac arrest and, due to the negligence of Doctor, an emergency room physician, in failing to resuscitate her in time, she suffered brain damage.

A month after the accident, Carl joined Andrew and Bart as an equal partner in The Eatery. Carl contributed \$100,000 in capital to the partnership which the partners intended to use to expand the size of their restaurant.

Two months after the accident, Frank consulted you regarding Denise’s death and his and Mary’s rights. He stated that his wife, Mary, has been left with brain damage and is confined to her bed, requiring full time care, and unable to work or to maintain their

marital relationship. Frank himself suffers from anxiety and depression as a result of seeing the injuries to his wife and daughter.

What will you advise Frank?

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(2:00 P.M. TO 5:00 P.M.)
QUESTIONS

ESSAY SECTION

6. Lawyer represented Buyer in a suit for breach of contract by Seller to sell a residential home to Buyer. In conferences in preparation of the case, Buyer made the following requests to Lawyer:

A. When having a witness subpoena served on the real estate broker, in addition to the statutory fee and expenses required to be paid, Lawyer should pay him \$2,500 "to show we value highly the time he will be spending in court and away from his business."

B. Lawyer should arrange for Buyer's secretary, who took notes at the conferences between Buyer and Seller, to be out of the state during any scheduled trial dates, so that she could not be subpoenaed as a witness.

C. In settlement negotiations with Seller's attorney, Lawyer should be sure to tell him "we have evidence which documents the fact that he, Seller's attorney, commingled the real estate deposit with his own personal funds."

D. Lawyer should make every effort possible to get an all-male jury because Seller is a woman.

E. Lawyer should place an advertisement in the local newspaper describing the case and asking for persons to contact him with evidence of the established custom by Seller to refuse to go through with real estate sales in order to procure more than the agreed-upon sales price.

What should be Lawyer's responses?

7. In 1996 the Commonwealth of Massachusetts established the Public Technology Investment Authority (“PTIA”), a state agency charged with promoting the development of high-technology private commercial enterprises in the Commonwealth. With state funding, PTIA purchased a defunct shopping center located in Anytown, Massachusetts.

PTIA established its principal office in the center, converted a small theater in the center to a conference facility, and leased other areas of the center to various professional firms.

The south-facing side of the center abutted Main Street in Anytown. Pedestrian entry to the conference facility and the private professional offices was directly from Main Street as well as from a parking lot servicing the center with access from Main Street. PTIA set up a security check-point at the parking lot entrance and posted the following notice at the entrance:

PTIA

- Access restricted to PTIA employees, tenants’ employees and visitors to PTIA and tenants
- No soliciting
- No leafleting or political signs or meetings allowed.

In late November, 2003, the Anytown Town Hall burned down. PTIA offered the town’s Board of Selectmen use of PTIA facilities for Board meetings until the Town Hall was repaired. The Board accepted and scheduled a meeting of the Board for December 5, 2003, in the conference center at which the only announced topic was renewal of the town’s contract with the Anytown Municipal Employees Association. (“Association”) A few days before the meeting, Association members began to distribute leaflets urging voters to contact the Selectmen to express their views on the proposed contract and asked

PTIA to permit leafleting on-premises and along the Main Street sidewalk abutting PTIA's property on the night of the Selectmen's meeting. PTIA refused; Association sued PTIA and the Board of Selectmen under federal civil rights statutes alleging violations of its and its members' constitutional rights; the court preliminarily enjoined the Board meeting and ordered an expedited summary judgment process on the propriety of PTIA's action; jurisdiction is not contested. PTIA and Association have cross-moved for summary judgment and filed memoranda of law in support of their positions.

The judge has asked you, as the court's law clerk, to prepare a brief memorandum outlining the positions of Association and PTIA and recommending how the court should rule.

8. BIG, Inc. (“BIG”), a Florida corporation, sued Boston Corp. (“Boston”), a Massachusetts corporation, in the United States District Court for the District of Massachusetts for breach of contract. During discovery, the parties made the following motions, all of which were opposed by the adverse party:

A. Boston noticed the depositions in Boston of several BIG employees, all of whom live in Florida. **BIG has moved to quash the notices.**

B. BIG’s counsel has privately interviewed two current and two former Boston employees without notice to Boston’s counsel. **Boston has moved (i) to bar BIG from calling any of the four as witnesses and using any information obtained from them at trial; and (ii) to disqualify BIG’s counsel from appearing in the case.**

C. Boston served an interrogatory on BIG asking BIG to detail the amount of its alleged damages. BIG answered by referring Boston to the 10,439 pages of BIG financial information previously produced in the litigation. **Boston has moved to compel BIG to provide a specific analysis of those documents to the extent that BIG intends to rely on them to prove damages.**

D. BIG noticed the deposition of Jones, the president of Boston. After about nine hours of testimony, with a half-hour break for lunch, Jones announced, “I’m out of here; I’ve had enough,” and left. **BIG has moved to compel Jones to return for two more full days of deposition and for sanctions.**

How should the court rule on each motion?

9. Yolanda, an artist, met Oliver at an exhibition of her paintings. They dated for a brief time and decided to marry. At Oliver's request, Yolanda agreed to sign an antenuptial agreement, drafted by Oliver's lawyers, which limited Yolanda's share of the marital assets in the event of divorce but was silent about alimony. Yolanda hired a lawyer to review the agreement and Yolanda and Oliver signed it a week before the wedding in a videotaped session in their new house. Several months later, they separated.

Yolanda and Frank began living together almost immediately and, 7 months later, Lucas was born. A few weeks later, Frank told Yolanda he was leaving, claiming that Lucas was not his child. Yolanda filed a paternity action. After genetic testing determined that Lucas was Frank's son, the court ordered that Frank pay child support payments for Lucas "until further order of this court." Frank did not appeal the court's ruling.

Yolanda and Oliver reconciled and lived together for 8 years until Oliver filed for divorce. After hearing, the court entered a judgment for divorce enforcing the provisions of the antenuptial agreement and requiring the payment of alimony only until "wife remarries or husband reaches his 65th birthday, whichever comes first." Oliver, who was 15 years older than Yolanda, was 56 years old at the time of the divorce judgment. Yolanda appealed.

Frank, who had been supporting Lucas, was killed in an accident within weeks of Yolanda's divorce decree. Lucas was 9 years old. Frank's will, written shortly before he died, mentioned Lucas and specifically excluded him from receiving any money from Frank's estate. Frank's parents, who had seen Lucas only occasionally up to that point, sued Yolanda for weekly visitation with Lucas.

What are the rights of the parties and what defenses, if any, can be raised by Oliver, Frank's estate and Frank's parents?

10. Harry and Wilma, Massachusetts residents, were married for 25 years and had two children, Doris and Sam. In 1978, Harry obtained a Florida divorce from Wilma that made no provision for alimony or for the support of their then minor children. Wilma filed a petition in the Massachusetts Probate Court for alimony and child support. In an effort to avoid further litigation, Harry returned to Massachusetts and executed an agreement under seal which contained the following provision:

I, Harry, agree to have and maintain a will which will bequeath and devise not less than two-thirds of my estate to the children of my marriage to Wilma.

The agreement was “subject to the approval of the Massachusetts Probate Court” which accepted the agreement in settlement of Wilma’s suit for alimony and child support. Although Harry remarried and moved to Vermont, Wilma and the children remained in Massachusetts and saw Harry occasionally since Harry’s business was also located in Massachusetts.

In 1980, Harry sold his business and transferred all of his assets to a revocable trust of which he was the sole trustee. Harry maintained control over the trust’s assets until his death in 1998 at which time two Vermont residents became trustees. Harry’s will made no provision for either Doris or Sam, both of whom were still living at the time of his death, and his probate estate contained no assets. Harry’s second wife was the sole beneficiary of the trust which had been created by Harry in 1980 with the proceeds of the sale of his business.

Sam died two months after Harry and Executor was appointed as set forth in Sam’s will. Two days before the first anniversary of Harry’s death, Executor and Doris brought suit in Massachusetts Superior Court against the Vermont trustees seeking an order requiring the trustees to transfer two thirds of the trust’s assets to them pursuant to Harry’s sealed post-divorce agreement. The Vermont trustees appeared in the Superior Court and moved to dismiss the action for lack of subject matter and personal jurisdiction. The trial judge allowed the Trustee’s motion to dismiss. Executor and Doris appealed.

Before the Superior Court case was decided, Executor loaned Sam's estate, which had no liquid assets and substantial liabilities, a substantial amount of money to satisfy existing debts and to pay the estate taxes so as to avoid penalties and interest. Executor filed a claim against Sam's estate for the amount loaned plus interest at 10% per year and the claim was disallowed because Executor had not obtained prior court approval either for the loan or the interest charged. Executor appealed.

How should the appellate court rule on the trial court's rulings allowing the trustees' motion to dismiss and disallowing Executor's claim?

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